Supreme Court, U.S.
FILED
SEP 5 1987
JOSEPH F. SPANIOL, JR.
CLERK

NO. 87-233

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1987

ANDREW WILSON HAYES,

PETITIONER,

VS.

STATE OF ALABAMA,

RESPONDENT.

ON A PETITION FOR A
WRIT OF CERTIORARI TO THE
ALABAMA COURT OF CRIMINAL APPEALS

RESPONDENTS' BRIEF IN OPPOSITION TO CERTIORARI

DON SIEGELMAN
ALABAMA ATTORNEY GENERAL

P. DAVID BJURBERG
ASSISTANT ALABAMA ATTORNEY GENERAL

OFFICE OF THE ATTORNEY GENERAL
The Alabama State House
11 South Union Street
Montgomery, Alabama 36130
(205) 261-7300

ATTORNEYS FOR RESPONDENT

NO. 87-233

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1987

ANDREW WILSON HAYES,

PETITIONER,

VS.

STATE OF ALABAMA,

RESPONDENT.

ON A PETITION FOR A
WRIT OF CERTIORARI TO THE
ALABAMA COURT OF CRIMINAL APPEALS

RESPONDENTS' BRIEF IN OPPOSITION TO CERTIORARI

DON SIEGELMAN
ALABAMA ATTORNEY GENERAL

P. DAVID BJURBERG
ASSISTANT ALABAMA ATTORNEY GENERAL

OFFICE OF THE ATTORNEY GENERAL
The Alabama State House
11 South Union Street
Montgomery, Alabama 36130
(205) 261-7300

ATTORNEYS FOR RESPONDENT

QUESTION PRESENTED

Whether this Court should grant certiorari to review issues which were not raised below and which were resolved entirely on state law grounds.

PARTIES

The caption contains the names of all the parties in the court below.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED.....	I
THE PARTIES.....	II
TABLE OF CASES.....	ii
TABLE OF OTHER AUTHORITIES.....	ii
OPINIONS BELOW.....	1
JURISDICTION.....	1
CONSTITUTIONAL PROVISIONS INVOLVED.....	2
STATUTORY PROVISIONS INVOLVED.....	2
STATEMENT OF THE CASE.....	3
SUMMARY OF THE ARGUMENT.....	10
ARGUMENT.....	10
CONCLUSION.....	17
CERTIFICATE OF SERVICE.....	18

TABLE OF CASES

	PAGE
Bailey v. Anderson, 326 U.S. 203, 206-207 (1945).....	14
Fox Film Corp. v. Muller, 296 U.S. 207 (1935).....	13
Michigan v. Long, 463 U.S. 1032 (1983).....	13
Street v. New York, 394 U.S. 572, 581-582 (1969).....	14
Wainwright v. Goode, 464 U.S. 78, 84 (1983).....	12

TABLE OF OTHER AUTHORITIES

	PAGE
Code of Alabama, 1975 §12-16-190- §12-16-233.....	11

OPINIONS BELOW

1. The opinion of the Alabama Court of Criminal Appeals affirming Petitioner's conviction is published as Hayes v. State, 507 So.2d 982 (Ala. Cr. App. 1986).

2. The Alabama Supreme Court's opinion quashing the writ of certiorari is published as Ex parte Hayes, 507 So.2d 995 (Ala. 1987).

JURISDICTION

The Alabama Supreme Court overruled Petitioner's application for rehearing on May 8, 1987. Petitioner was given until August 6, 1987 to file his petition by an order from Justice White. Petitioner's brief was mailed on August 6, 1987 according to the certificate of service. Thus, his brief appears to be untimely. Rule 28.2

Respondents assert that this Court does not have jurisdiction since the issues raised here were not raised below or were decided strictly on state law.

CONSTITUTIONAL PROVISIONS INVOLVED

The Petitioner addresses issues involving the Sixth and Fourteenth Amendments to the United States Constitution.

STATUTORY PROVISIONS INVOLVED

Respondent presents no issue of statutory interpretation.

STATEMENT OF THE CASE

Petitioner and his co-defendant were indicted for and convicted of securities fraud pursuant to §8-6-17, Code of Alabama, 1975. Hayes v. State, 507 So.2d 982, 983 (Ala. Cr. App. 1986). Petitioner was sentenced to five years in the penitentiary on each of the two counts the jury convicted him on.

The Alabama Supreme Court granted certiorari and after full briefing and oral argument, quashed the writ as improvidently granted. Ex parte Hayes, 507 So.2d 995 (Ala. 1987). Rehearing was denied on May 8, 1987.

Petitioner was given until August 6, 1987 to file his petition in this court. Said petition was mailed on said date according to the certificate of service but apparently without an accompanying affidavit since Respondents did not receive one.

The facts surrounding the crime are lengthly and are found in the lower court's opinion which is reproduced as an appendix to the petition.

Facts pertaining to the presentment of the indictment issue, which is the basis of Petitioner's issues one and two, are reproduced below from the Court of Criminal Appeals' opinion for the Court's convenience.

> The appellant, Hayes, filed a motion to challenge the Grand Jury asserting that certain improprieties occurred with reference to the presentation of the State's evidence to the Grand Jury and that certain procedural irregularities occurred at the time the indictment was returned and requested the trial court to allow him to examine the members of the Grand Jury. This motion is contained on record page 1110 of this record.
>
> A supplemental transcript was filed in this court which is identified as Transcript A and Transcript B. This supplemen-

tal transcript contains a stipulation of the attorneys with reference to the hearing before the trial judge concerning the alleged improprieties in presenting the indictment to the trial court.

For brevity, the Attorney General's office drafted two indictments in this cause. The first indictmant contained 19 counts, five of which pertained to the appellant, Hayes, and 14 counts pertained to the defendant, Redmond. This indictment is referred to as the Hayes-Redmond indictment in the stipulation.

The second indictment contained 14 counts pertaining only to the defendant, Redmond. The 14 counts as to the defendant, Redmond, were identical in each indictment.

Some seven witnesses appeared before the Grand Jury including the appellant, Hayes, on October 27, 1983. Scores of documents were also presented to the Grand Jury.

Because of the late hour, it was agreed that the Grand Jury would vote the following morning on October 28, 1983.

One of the prosecutors, Pat Robinson, handed what he thought to be the Hayes-Redmond indictment to the foreman of the Grand Jury, one Mary Northcutt. Each count of this indictment was explained to the Grand Jury. The Grand Jury was asked to vote on each count of the indictment and that they should return no bill if they felt the evidence was insufficient as to any count.

Soon after the grand jurors voted, they sent word that they were ready to present the indictment in court. The prosecutors were informed that a true bill had been returned on the Hayes-Redmond indictment. This action was presented to Judge Wilters in open court at approximately 1:30 p.m. on the afternoon of October 28, 1983. After thanking the members of the Grand Jury for performing their duty, the grand jurors were directed to proceed to the circuit clerk's office in order to be paid. At this point, Judge Wilters had not entered an order discharging the grand jurors as such.

Within two or three minutes after the members of the Grand Jury left the court room to go to the clerk's office, it was discovered that, in fact, the

grand jurors had signed the "Redmond indictment" and not the "Hayes-Redmond indictment."

Judge Wilters then directed that all grand jurors return from the clerk's office to his court room at once. Sixteen members of the Grand Jury then reconvened in Judge Wilters office at approximately 1:45 p.m. on the afternoon of October 28, 1983. These 16 grand jurors then advised Judge Wilters that they, in fact, had returned a true bill on the "Hayes-Redmond indictment". Judge Wilters was satisfied that an honest mistake had been signed by the foreman of the Grand Jury. Judge Wilters then directed the Hayes-Redmond indictment be retyped in order to allow adequate space to be left on which to set bond as to each of the two defendants. With the members of the Grand Jury still present in the court room, Judge Wilters then asked, and Mr. Robinson asked each of then, which indictment they had voted to return. Each individual grand juror responded that they had voted to return the "Hayes-Redmond indictment". Each was then asked if they had any objection to having the indictment corrected and to allow space for the trial judge to set bail and all replied that

they had none. Each of the grand jurors then left the court room except for the foreman, Mrs. Northcutt.

Within less than five minutes after the departure of the remaining members of the Grand Jury, Judge Wilters' secretary completed the retyping of the Hayes-Redmond indictment in order to allow space for the trial judge to set bonds as to each defendant.

Mrs. Northcutt then reaffirmed that the grand jurors had only considered the Hayes-Redmond indictment and that this was the indictment which she had been directed to sign. The Hayes-Redmond indictment then was signed and processed through the circuit clerk's office as the indictment which had been voted upon by the members of the Grand Jury.

The original "Redmond indictment" was not voted upon and was not signed because the members of the Grand Jury indicated that this was not the indictment which they returned. This indictment was retained in the possession of Mr. Robinson.

Following the conclusion of the hearing at which the State

and the defendant each presented witnesses, the trial court made findings that, in fact, a proper indictment had been returned and was in proper form and that this was the "Hayes-Redmond indictment". This was stipulated. See Record .07 of Exhibit A, Supplemental Transcript.

In light of the stipulation which was filed and is a part of this record on appeal and the findings of the trial judge as to what actually transpired in the Grand Jury, this court finds no violation of any statute with reference to the Grand Jury proceedings in this State. See Sections 12-16-190 through 12-16-233, Code of Alabama 1975 as amended.

[1] We have reviewed each of the statutes as hereinabove noted and find no improprieties in the presentment of this cause to the Grand Jury or in the presentation of the correct indictment to the court by the Grand Jury in this cause. No error appears.

507 So.2d at 984-985.

SUMMARY OF THE ARGUMENT

This Court should deny certiorari because the decision below rests on state law grounds and thus this Court does not have jurisdiction.

This Court should deny certiorari because Petitioner has failed to comply with this Court's rules concerning filing of briefs.

ARGUMENT

I.

The issues presented in the petition are couched in terms of violations of the Sixth and Fourteenth Amendments in an effort to invoke this Court's jurisdiction. However, in the lower courts, the issues were presented in terms of violations of state statutes, procedural rules or case law and they

were decided on those terms and not on Federal Constitution grounds.

For example, the major contention throughout this litigation has been whether the prosecutor was present in the grand jury room when the grand jury voted on the indictment - even though the stipulation entered into by the Petitioner admits that the prosecutors were not present. (App. to Pet at 80). The Alabama Court of Criminal Appeals opinion makes it abundently clear their decision rests on their interpretation of state law concerning grand jury proceedings: "...this court finds no violation of any statute with reference to the Grand Jury proceedings in this State. See Sections 12-16-190 through 12-16-233, Code of Alabama, 1975 as amended." "We have reviewed each of the

statutes as hereinabove noted and find no improprieties in the presentment of this cause to the Grand Jury or in the presentation of the correct indictment to the court by the Grand Jury in this cause." (App. to Pet at p. 16)

Clearly the decision of the Court of Criminal Appeals rests solely on its interpretation of state law and not on Federal Constitutional grounds.

In other contexts, this Court has held that a state's court interpretation of its own statutes and rules does not involve Constitutional principles and is binding on the federal courts. Wainwright v. Goode, 464 U.S. 78, 84 (1983). Clearly, the Court of Criminal Appeals was merely interpretating state law concerning the presentment of the indictment to the trial court. No

federal constitutional provision is recited by the lower court. Thus, this case is even "simpler" than the situations where state and federal grounds are intertwined and this Court must decide if the state ground was "adequate" and "independent".[1] The lower court relied strictly on state law to resolve the question. Thus, there is no federal question presented to this Court.

Since the issue was resolved on state law grounds, this Court lacks jurisdiction over this issue. Fox Film Corp. v. Muller, 296 U.S. 207 (1935); Michigan v. Long, 463 U.S. 1032 (1983).

---

[1]See: International Longshoremen's Association, AFL-CIO v. Davis, ___ U.S. ___, 106 S.Ct. 1904, 90 L.Ed.2d 389 (1986).

The alleged due process violations were never presented to the state courts and were never decided by them. Where an issue is not raised or decided by the state court below, this Court has no jurisdiction to consider it. Street v. New York, 394 U.S. 572, 581-582 (1969); Bailey v. Anderson, 326 U.S. 203, 206-207 (1945).

Thus, this Court should deny the writ on issues one and two.

In issue three of the petition (pp. 19-21) the Petitioner asks this Court to establish, "...a per se rule that a state must follow its own established procedures..." (Pet. at p. 20). This request ignores the fact that the Court of Criminal Appeals has found that the State did follow its statutes concerning grand jury proceedings. 507 So.2d at 984.

The fourth issue raised is based entirely on the dissenting opinion of four Alabama Supreme Court justices to the quashing of the writ of certiorari in the state court. Clearly this opinion is not before this Court for review. Even if it were, that opinion is also grounded on interpretation of state statutes and case law. Nowhere in that opinion is the Federal Constitution even mentioned. The dissenters merely disagreed with the majority in this interpretation of state statutes. Again, since this opinion rests entirely on state law, this Court would lack jurisdiction even if this opinion was before this Court. Street v. New York, Bailey v. Anderson, supra.

II.

According to the certificate of service the petition and brief were mailed on August 6, 1987, the last day accorded Petitioner by Justice White.

According to this Court's rule 28.2, to be timely, a petition must be received by the clerk within the time specified unless accompanied by an affidavit detailing the manner of mailing. Respondents have received no such affidavit and wish to bring this deficiency to the Court's attention.

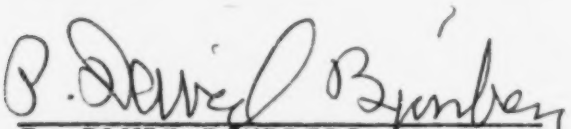
Respondents are aware of the fact that timely filing of the petition is not jurisdictional, but Respondents urge the Court to decline to grant the writ because of this deficiency.

CONCLUSION

This Court should deny the petition for a writ of certiorari.

Respectfully submitted,

DON SIEGELMAN
ALABAMA ATTORNEY GENERAL
BY-



P. DAVID BJURBERG
ASSISTANT ALABAMA ATTORNEY GENERAL

ADDRESS OF COUNSEL:

Office of the Attorney General
The Alabama State House
11 South Union Street
Montgomery, Alabama 36130
(205) 261-7300

CERTIFICATE OF SERVICE

I, P. David Bjurberg, an Assistant Attorney General of Alabama, a member of the Bar of the Supreme Court of the United States and one of the Attorneys for the State of Alabama, hereby certify that on this 3 day of September, 1987, I did serve the requisite number of copies of the foregoing on the Attorney for the Petitioner, by mailing the same to said attorney, first-class postage prepaid and addressed as follows:

Honorable Thomas M. Haas
Honorable Christopher Knight
255 Saint Francis Street
Mobile, Alabama 36602

P. David Bjurberg

P. DAVID BJURBERG
ASSISTANT ALABAMA ATTORNEY GENERAL

ADDRESS OF COUNSEL:

Office of the Attorney General
The Alabama State House
11 South Union Street
Montgomery, Alabama 36130
(205) 261-7300